KOH SIAK POO

v.

SAYANG PLANTATION BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: A-02-190-1998]
29 NOVEMBER 2000

CIVIL PROCEDURE: *Appeal - Interference by appellate court - In what circumstances - Duty of appellate court - Whether appeal on question of law or fact*

CIVIL PROCEDURE: *Pleadings - Defects in pleadings - Whether bad in law - Whether there had been misdirection due to bad pleadings*

CONTRACT: *Claim for money had and received - Whether there was a total failure of consideration - What amounts to total failure of consideration*

This appeal was directed against the trial judge's finding that the respondent had established a cause of action in the quasi-contractual claim for money had and received on the ground that there had been a total failure of consideration. The appellant argued that the statement of claim of the respondent had failed to set out the essential ingredients to sustain an action for money had and received. It was also submitted that the respondent's case was bad because it did not allege either a contract or other equivalent legal basis on which a claim for money had and received was grounded.

Counsel for the respondent on the other hand argued that the real question was whether the appellant had received the moneys in question and used them for the purpose for which they were given to him. He further argued that in the pleaded facts, there was revealed sufficiently a contract between the appellant and the respondent by the terms of which the appellant was to obtain for the respondent's benefit, certain joint venture agreements of certain lands for cultivation into an oil palm plantation.

The issue for consideration was whether the trial judge was right in concluding that there was a total failure of consideration warranting the making of a restitutionary order.

Held:

Per Gopal Sri Ram & Abdul Kadir Sulaiman JJCA (majority)

[1] The duty of the appellate court is to determine whether the appellate judges who do not have the advantages of having seen or heard the witnesses are in a position to come to a clear conclusion that the judge who had such advantages was plainly wrong. If the appellate judges cannot be satisfied in their minds that the judge with those advantages was plainly wrong, then it is their duty to defer to his judgment. Since this was in essence an appeal on a question of fact, the appellate judge in deciding whether to interfere with the finding of the trial judge must first be satisfied that the trial judge was plainly wrong in his finding of fact. (p 507 d-e)

[2] Despite the bad pleadings there had been no misdirection on the part of the trial judge upon the central issues that called for determination in this case. (p 511 f)

[3] When one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. (p 508 g-h)

[4] A restitutionary claim based on total failure of consideration will succeed only if the failure is total. It is accepted today that money paid under an ineffective contract which has been brought to an end may be recoverable in restitution, even though the contract has been rescinded *ab initio.* (p 509 f-h)

[Appeal dismissed; cross-appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan ini adalah ditujukan terhadap keputusan hakim perbicaraan bahawa responden telah menentukan satu kausa tindakan dalam tuntutan kuasi-kontraktual untuk wang yang dipunyai dan diterima atas alasan bahawa terdapatnya kegagalan pertimbangan yang sesungguhnya. Perayu berhujah bahawa pernyataan tuntuan responden telah gagal untuk membentangkan perkara-perkara penting untuk mengekalkan sesuatu tindakan untuk wang

yang dipunyai dan diterima. Adalah juga dihujahkan bahawa kes responden adalah tidak wajar kerana ianya tidak mendakwa sama ada sesuatu kontrak atau asas lain yang sah di atas yang mana sesuatu tuntutan untuk wang yang dimiliki atau diterima telah dijadikan dasar.

Peguam bagi pihak responden sebaliknya berhujah bahawa persoalan sebenar adalah samada perayu telah menerima wang yang dipersoalkan dan menggunakannya bagi tujuan yang mana ianya telah diberikan kepada dia. Beliau selanjutnya berhujah bahawa dalam fakta-fakta yang diplidkan, telah didedahkan dengan secukupnya satu kontrak antara perayu dan responden melalui terma-terma yang mana perayu dikehendaki memperolehi untuk kemanfaatan responden, perjanjian-perjanjian usaha sama yang tertentu bagi tanah-tanah yang tertentu untuk dijadikan ladang kelapa sawit.

Isu untuk dipertimbangkan adalah samada hakim perbicaraan adalah betul dalam memutuskan bahawa sesungguhnya terdapat kegagalan pertimbangan yang mewajarkan pembuatan satu perintah restitusi.

Diputuskan:
Oleh Gopal Sri Ram & Abdul Kadir Sulaiman HHMR (majoriti)

[1] Tugas mahkamah rayuan adalah untuk menentukan sama ada hakim rayuan yang tidak mempunyai kelebihan melihat atau mendengar saksi-saksi, mempunyai kedudukan untuk mencapai kesimpulan yang nyata bahawa hakim yang mempunyai kelebihan yang sedemikian adalah jelas salah. Jika hakim rayuan tidak berasa puas bahawa hakim yang mempunyai kelebihan itu adalah jelasnya salah, maka ianya adalah tugas beliau untuk berserah kepada penghakiman hakim dibawah itu. Oleh kerana ini adalah suatu rayuan atas persoalan fakta, hakim rayuan dalam memutuskan sama ada hendak mengganggui keputusan hakim perbicaraan mestilah terlebih dahulu berpuas hati bahawa hakim perbicaraan tersebut adalah jelas salah dalam keputusan fakta beliau.

[2] Walaupun pliding-pliding adalah tidak betul, tidak terdapat salah arahan oleh hakim perbicaraan ke atas isu-isu penting yang memerlukan penentuan dalam kes ini.

[3] Apabila seseorang mempertimbangkan undang-undang kegagalan balasan dan hak kuasi-kontraktual untuk memperolehi wang atas alasan itu, ianya adalah pada umumnya bukan janji tersebut yang dirujuk sebagai balasan tetapi perlaksanaan janji tersebut.

[4] Tuntutan restitusi yang berdasarkan kegagalan balasan yang sesungguhnya akan berjaya hanya jika kegagalan adalah sepenuhnya. Adalah diterima pada hari ini bahawa wang yang dibayar di bawah kontrak yang tidak berkesan yang telah ditamatkan boleh diperolehi semula dalam restitusi, meskipun kontrak tersebut telah dibatalkan *ab initio.*

[Rayuan ditolak; rayuan balas dibenarkan.]

Case(s) referred to:

Agip (Africa) Ltd v. Jackson [1990] Ch 265 ***(refd)***

Banque Financiere de la Cite v. Parc (Battersea) Ltd [1998] 2 WLR 475 ***(refd)***

Brown & Root (Labuan) Sdn Bhd v. Pada Sdn Bhd [1987] 1 CLJ 229; [1987] CLJ (Rep) 78 ***(refd)***

Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(foll)***

Clarke v. Bristol Tramways [1919] SC 35 ***(foll)***

Goss v. Chilcot [1996] AC 788 ***(foll)***

Grace Shipping Inc & Anor v. CF Sharp & Co (Malaysia) Pte Ltd [1987] 1 MLJ 257 ***(foll)***

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(foll)***

Kleinwort Benson v. Lincoln City Council [1999] 2 AC 349 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 ***(foll)***

Lever Brothers Ltd v. Bell [1931] 1 KB 557 ***(refd)***

Norata Singh v. Serdara Singh [1967] 1 MLJ 265 ***(foll)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 ***(refd)***

Sinclair v. Brougham [1914] AC 398 ***(not foll)***

State Government of Perak v. Muniandy [1986] 1 MLJ 490 ***(foll)***

Tindok Besar Estates Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

Transvaal & Deloga Bay Investment Co Ltd v. Atkinson [1944] 1 All ER 579 ***(not foll)***

United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 ***(foll)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 ***(foll)***

Other source(s) referred to:

Goff & Jones, *The Law of Restitution,* 1998, 5th edn, pp 505, 703

For the appellant - Mahinder Singh Dulku (Wong Yee Chue); M/s Mahinder Singh Dulku & Co

For the respondent - Cecil Abraham (Nad Segaram & Gerald Samuel); M/s Lim Kean Siew & Co

[Appeal from High Court, Ipoh; Civil Suit No: 23-167-1988]

Reported by Mariette Peters-Goh

JUDGMENT

Gopal Sri Ram JCA (majority):

This appeal has been brought against the decision of the High Court of Ipoh entering judgment for the respondent/plaintiff in the sum of RM663,000 and consequential relief. Judgment was also entered for the appellant/defendant on his counterclaim in the sum of RM100,640.99 together with interest and other ancillary relief. A cross appeal against judgment on the counterclaim has also been pursued before us.

The main thrust of the appeal is directed against the judge's finding that the respondent had established a cause of action in the quasi-contractual claim for money had and received on the ground that there had been a total failure of consideration. In a carefully developed argument, Dato' Mahinder Singh has submitted that the statement of claim delivered by the respondent has failed to set out the essential ingredients to sustain an action for money had and received. He complains, not without justification, that the pleaded case of the respondent is woefully bad because it does not allege either a contract or other equivalent legal basis on which a claim for money had and received is grounded.

I accept, as did the learned judge, that the statement of claim is less than adequate as a perfect pleading. But equally, I must say that I am in agreement with the learned judge and with Mr. Abraham, who has argued the respondent's case before us, that the necessary facts to sustain a cause of action for money had and received, have been sufficiently pleaded in the statement of claim. The fact that the defendant was in no way misled by what the plaintiff was seeking to prove or establish is confirmed by the defendant's defence: in the way in which the appellant has answered the allegations in the statement of claim.

In *Lever Brothers Ltd v. Bell* [1931] 1 KB 557, (applied by this court in *Quah Swee Khoon v. Sime Darby Berhad* [2001] 1 CLJ 9), Scrutton LJ adverted to the necessity of pleading only material facts. He said:

> The practice of the courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.

So too here. The respondent has sufficiently set out the fact pattern on which it seeks to rely in support of its claim for money had and received.

The central question in the appeal is therefore whether the learned judge was right in concluding that there was a total failure of consideration warranting the making of a restitutionary order. And it is upon this issue that counsel on both sides have focussed their arguments.

Dato' Mahinder Singh has argued that the learned judge's assessment of the evidence in the round was misconceived. In other words, there was no judicial appreciation of the evidence. Counsel has in his usual manner, painstakingly taken us through the important areas of the evidence both oral and documentary. He submits that the proper conclusion to be drawn from the totality of the evidence is that the appellant had acted as a mere conduit and had done all that was required of him. There was therefore no factual basis upon which the learned judge could have come to the conclusion that he did. I trust that I will be forgiven if I do not deal with every argument and sub-argument that Dato' Mahinder has advanced to us on this part of the case. I think I have done counsel no injury in the way in which I have summed up his arguments.

For the respondent, Mr. Abraham has argued that the real question is whether the applicant received the moneys in question, and used them for the purpose for which they were given to him. He says that on the pleaded facts, there is revealed sufficiently, a contract between the appellant and the respondent, by the terms of which the appellant was to obtain for the respondent's benefit, certain joint venture agreements of certain lands for cultivation into an oil palm plantation. Counsel argues that the consideration for this agreement was the payment of the moneys set out in the statement of claim. Mr. Abraham goes on to point out that the learned judge found as a fact that the appellant had not utilised the moneys for the purpose for which they were handed to him. Our attention has also been drawn to the passages in the evidence, principally in the cross-examination of the appellant, which show that the appellant was misleading the respondent's board of directors at the material time.

Having given this matter my most careful consideration, I find myself in agreement with the arguments advanced by Mr. Abraham. This is in essence an appeal on a question of fact. The role which an appellate court plays in an appeal such as this is reflected in the speech of Lord Shaw of Dunfermline in *Clarke v. Bristol Tramways* [1919] SC (HL) 35, 36 where he says:

> When a judge hears and sees witnesses and makes a conclusion or interference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have, in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of their eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case, – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Further, I am satisfied that the criticisms mounted by Dato' Mahinder Singh upon the way in which the learned judge approached the evidence is sufficiently met by the judgment of Chang Min Tat FJ in *Tindok Besar Estates Sdn Bhd v. Tinjar Co.* [1979] 2 MLJ 229, 234:

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

For my part, I am entirely satisfied that the learned judge adopted the approach commended by Chang Min Tat FJ in the passage above quoted. There is in my judgment no misdirection on the part of the learned judge upon the central issues that called for determination in this case. As an appellate court, we ought not, I think, to interfere in a case like this. For good measure, support for the view I now form may be found in *Grace Shipping Inc & Anor v. C.F. Sharp & Co. (Malaysia) Pte Ltd* [1987] 1 MLJ 257 and in *Norata Singh v. Serdara Singh* [1967] 1 MLJ 265.

That brings me to the final point in the case. It has to do with the principles governing an action for money had and received. For present purposes, I do not think it will be useful to enter upon a historical analysis of this cause of action. Suffice to say that we have come a long way from the narrow approach enunciated by Lord Sumner in *Sinclair v. Brougham* [1914] AC 398. The time has arrived when we can confidently assert that that case has been overruled and is no longer good law. The present position is, I think, governed by the judgment of the Privy Council in *Goss v. Chilcot* [1996] AC 788 and the views expressed by the House of Lords in two other cases, namely, *Banque Financiere de la Cite v. Parc (Battersea) Ltd.* [1998] 2 WLR 475 and *Kleinwort Benson v. Lincoln City Council* [1999] 2 AC 349.

I think it is sufficient, for the present appeal, for me to refer to the following passage in the advise of the Board in *Goss v. Chilcot (ibid)* which was delivered by Lord Goff of Chievely:

> But the consideration there referred to, necessarily implicit if not explicit in every loan contract, was the consideration necessary for the formation of the contract; and, as Viscount Simon LC observed in a much-quoted passage in his speech in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, 48:
>
> > … when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise … If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled.

> Of course, in the case of a loan of money any failure by the borrower to repay the loan, in whole or in part, by the due date, will in ordinary circumstances give rise to a claim in contract for repayment of the part of the loan which is then due. There will generally be no need to have recourse to a remedy in restitution. But in the present case that course is, exceptionally, not open to the company, because the defendants have been discharged from their obligations under the mortgage instrument; and so the company has to seek recovery in restitution. Let it however be supposed that in the present case the defendants had been so discharged from liability at a time when they had paid nothing, by way of principal or interest, to the company. In such circumstances their Lordships can see no reason in principle why the company should not be able to recover the amount of the advance made by them to the defendants on the ground that the money had been paid for a consideration which had failed, *viz.* the failure of the defendants to perform their contractual obligation to repay the loan, there being no suggestion of any illegality or other ground of policy which had precluded recovery in restitution in such circumstances.

I must add that there is a very useful discussion of the relevant cases and the present trend of authority in *Goff and Jones, The Law of Restitution,* 5th edn (1998) which is the leading textbook on the subject. I think I owe it to its authors to quote the following passage from their work (at p. 505):

> A restitutionary claim, based on total failure of consideration, will therefore, succeed, only if the failure is total. However, it must be remembered that other principles of restitution must be observed. In particular, when money has been paid under a contract which was originally effective, that contract must be determined before the money is recoverable in restitution; if the contract is not brought to an end, the payer is restricted to his remedies under the contract which continues to govern the situation. At one time, indeed it was thought necessary that the contract should be rescinded *ab initio* before the payer could recover his money in restitution. But harsh results followed, particularly in cases of frustrated contracts, where rescission *ab initio* was impossible; for there the payer had usually no claim in damages, and if he could not recover his money in restitution he was left without a remedy. Today, however, it is accepted that money paid under an ineffective contract which has been brought to an end may be recoverable in restitution, even though the contract has been rescinded *ab initio*.

Dato' Mahinder Singh has, in support of his argument against the finding of liability, referred us to the following passage in the judgment of Atkinson J in *Transvaal & Deloga Bay Investment Company Ltd v. Atkinson* [1944] 1 All ER 579, 585:

I do not think that case helps me here at all. Certainly the proposition of counsel for the plaintiffs is too wide. For example, it is not the rule of law as expressed by Lord Loreburn, quoted with approval by Lord Mersey, in *Kerrison v. Glyn Mills Currie & Co.* [1911] 81 LJKB 465 that when money paid under a mistake of fact is re-demanded from that person before his position had been altered to his disadvantage the money must be repaid in whatever character it was received, but I think the law is more clearly and fully expressed by Collins, M.R., as he then was, in *Continental Caoutchouc and Gutta Percah Co. v Kleinwort, Sons & Co.* [1904] 90 LT 474 at 476 and I take this to be the law:

> It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money or the purpose of handing it on to a third party, and has handed it on, is no longer accountable to the sender. In such a case he is a mere conduit pipe, and has not had the benefit of the windfall.

In the same case, Romer LJ says, at p. 477:

> When the mistake in fact was discovered the plaintiffs became entitled to recover the moneys from the defendants, unless the defendants could show that they had received the moneys as agents, and before notice of the mistake had parted with them to their principal., or so dealt with them by mandate of their principal as to render it unjust to call upon them to repay the moneys to the plaintiffs.

In *Kleinwort Sons & Co. v. Dunlop Rubber Co.* [1907] 97 LT 263 Lord Atkinson says in effect precisely the same thing. These certain questions had been put to the jury, and one question that the jury had answered was that the money had been received by the defendants in their capacity as principals, but Lord Atkinson fully recognised, and dealt with at some length – I need not read out what he said – the position of a person who came within those words which I have just read from the Judgments of Lord Collins M.R. and Romer L.J.

I am satisfied in this case that the defendant did not receive the money for her own personal benefit or personal enrichment, but merely as her husband's agent. The husband was not a thief in order to benefit her but himself, and so far as she was concerned the money came not from the plaintiffs but from the husband on the terms that part was at once to be returned, and that household and personal expenses (for which as husband

> he would be bound to provide) were to be paid out of the rest. Regular payments from his salary were later made into the account, and it is plain that she was in truth but her husband's agent for the distribution of the money. Where is the unjust enrichment in this case? What are the circumstances which make it *ex aequo et bono* that the defendant ought to refund? I can see none. The position, therefore, is that it is impossible to imply a promise to repay, that it would be unjust to imply such a promise even if it were possible, and that there are no circumstances which make it unconscientious for the defendant to resist a personal judgment against her, and I think the defendant is entitled to judgment.

Now it must be remembered that the views of Atkinson J and those of the learned jurists he relied on were expressed at a time when *Sinclair v. Brougham* held the field. But as I have said, we have made much progress since then. Further, there is a comment in the footnote at p. 703 of *Goff and Jones, The Law of Restitution* 5th edn (1998) which appears to suggest that the *Transvaal* case *(supra)* is no longer sound, especially in view of the more recent decision of Millett J, (as he then was) in *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265.

But there is another ground upon which the *Transvaal* case may be distinguished from the present appeal. In that case, Atkinson J found as a fact that the wife had received no benefit and had not been enriched. In the present case, there is a positive finding of fact by the learned judge that the appellant did not utilise the moneys for the purpose for which they were entrusted to him. This divergence in the fact pattern of both these cases is, in my judgment, a sufficient answer to the appellant's reliance on the passage quoted above in the Judgment of Atkinson J in the *Transvaal* case.

Looking at the matter once again in its totality, I'm driven to the conclusion that the learned judge, though disadvantaged by bad pleadings, came to the right conclusion on the evidence.

Turning now to the counterclaim, Mr. Abraham complains that the learned judge, without expressly rejecting the plaintiff's evidence on the point, failed to give credit in respect of a sum of RM70,000 which the appellant had received from the respondent. There is a comment in the judgment by the learned judge that the original vouchers in respect of these payments had not been produced. But it is clear from the evidence that the witnesses for the respondent did identify the appellant's signature. In those circumstances, it was incumbent for the learned judge to expressly say whether he accepted that evidence, and if he did not, why he chose

that course. That is not the case here. I think therefore that there is justification in the respondent's complaint that the learned judge ought to have given credence as a matter of fact to the evidence of a witness who was familiar with the appellant's signature. The respondent is therefore entitled to a reduction in the sum of RM70,000 in respect of the sum owed to the appellant in the counterclaim.

For the reasons given, the appeal is dismissed and the cross appeal is allowed to the following extent; that the judgment on the counter claim is reduced to the extent of RM70,000. The respondent will have the costs of both the appeal and the cross-appeal. The deposit will be paid out to the respondent to account of its taxed costs.

My learned brother, Abdul Kadir bin Sulaiman JCA joins me in this judgment, while my learned brother Mokhtar bin Haji Sidin JCA dissents.

Mokhtar Sidin JCA (dissenting):

The respondent who was the plaintiff in the court below claimed for the return of the sum of RM663,000 from the appellant who was the defendant in the court below. The appellant at all material times was a director of the respondent. On 3 May 1982 a sum of RM369,000 was handed over to the appellant for the purposes of paying all expenses necessary or incidental to obtaining or procuring a joint venture agreement with the landowners in respect of certain lands in the Mukim of Senggang, Kuala Kangsar, Perak (hereinafter referred to as "Rancangan Tanah Senggang B") to develop those lands into an oil palm plantation. On or about 16 June 1984, a further sum of RM185,000 was given to the appellant for the purpose of procuring another joint venture agreement with owners of certain lands (hereinafter referred to as "Rancangan Tanah Senggang E") for development into an oil palm plantation. Between 16 June 1984 and 5 May 1985, a further sum of RM109,000 was given to the appellant to procure another joint venture agreement with the owners of certain lands (hereinafter referred to as "Rancangan Tanah Hong") for development of the lands into an oil palm plantation. The total sum of those money given was RM663,000 which is the subject matter of this appeal. The respondent in their statement of claim claimed that the appellant failed to procure the joint venture agreements in respect of those lands. The respondent then demanded the return of the money given but appellant failed to do so. It was also stated in the statement of claim that the appellant had at a meeting of the board of directors on 18 October 1987, by a deed of settlement, agreed to repay the said amount. When the appellant failed to do so, the respondent filed the present action to recover the said sum under the settlement.

The appellant in his statement of defence admitted receiving the said sum. The appellant claimed that he had succeeded in procuring the joint venture agreements with 132 owners in respect of Rancangan Tanah Senggang B and the agreements were with the respondent's company secretary, Madam Tang Mee Yin. The total acreage of the land in respect of this was 738 acres and the title deeds were with the landowners' duly appointed attorney, Haji Abdul Razak bin Alang Mohd. Appellant went on to state in the defence that the sum of RM369,000 was given to Khor Weng Cheong for disbursement to the landowners in order to procure the joint venture agreement. The respondent knew about this and as such respondent could not ask for the return of the said sum because he had expended the money for the purpose it was entrusted to him. In respect of the sum of RM185,000, the appellant claimed that this was entrusted to him to procure the joint venture agreement in respect of 370 acres of land in Rancangan Tanah Senggang E. It was admitted by the appellant that the joint venture agreement had not been executed by the landowners even though the money had been paid to the landowners' attorney to be disbursed to the landowners. The appellant claimed that the money was expended for the purpose it was entrusted and as such the respondent could not ask for the money to be refunded. In respect of the sum of RM109,000 the appellant claimed that this money was entrusted to procure a joint venture agreement with the landowners of 1,000 acres of land in Rancangan Tanah Hong. The money was given to Khor Weng Cheong, Ismail bin Taib and a few others to be paid to the landowners to secure the deal. Appellant claimed that to secure the deal the respondent had to make a further payment of RM391,000. The respondent was unable to make the said payment and as such the deal fell through. Appellant claimed that the fault was with the respondent for not being able to raise that sum although he has struck a bargain with the landowners. For that reason the appellant was not obliged to return the said sum.

In respect of the settlement to repay the sum, the appellant admitted attending the board of directors' meeting on 18 October 1987, but on seeking an independent legal advice he did not sign the settlement deed. As such there was no settlement to repay the said sum as claimed by the respondent.

The appellant in his statement of defence counterclaimed against the respondent for the sum of RM100,640.09 which he claimed that he had advanced to the respondent and this sum had not been repaid by the respondent.

In his judgment the learned trial judge found that the appellant had not expended the money given to him by the respondent, ie, to secure the joint venture agreements and he allowed the claim by the respondent. The learned judge also found that the appellant had advanced the sum of RM100,604.09 to the respondent which was never repaid by the respondent and found for the appellant in respect of the counterclaim.

Being dissatisfied with that decision the appellant appeals against that decision to this court. The respondent who was not satisfied with the decision of the learned judge on the counterclaim appeal against that decision.

At the conclusion of this appeal my learned brothers, Gopal Sri Ram, JCA and Abdul Kadir bin Sulaiman, JCA found in favour of the respondent and dismissed the appeal. Gopal Sri Ram, JCA gave an oral judgment in open court. I had expressed my reservations in respect of that decision and now I give my reasons for doing so.

Before us the learned counsel for the appellant raised four issues and I will deal with them in the order that they were raised.

What Is The Respondent's Cause Of Action As Pleaded In The Statement Of Claim?

The learned trial judge in his writtten judgment stated that the statement of claim did not disclose a cause of action in respect of the settlement. I agree with the learned judge that as it is the statement of claim did not disclose any cause of action in respect of the settlement. From the evidence it is clear that there was no settlement. No settlement was ever produced and as admitted by the appellant he did not execute the deed after obtaining independent legal advice. Appellant admitted the board meeting where the settlement was proposed but did not execute the settlement deed. As such there was no settlement. In my view, the learned judge recognised this and came to the conclusion stated above.

The learned judge did not stop there but went further when he said that after perusing the statement of claim he came to the conclusion there was another cause of action disclosed. The learned judge in his judgment stated:

> The plaintiff's Statement of Claim is badly drafted. A cursory reading of the 11 paragraphs of the material facts pleaded in the Statement of Claim, appear to disclose that the plaintiff is merely seeking to enforce the settlement that the defendant had purportedly entered into with the plaintiff at the Board of Directors meeting on 18th October 1987, that is to say

> the payment of the total sums of RM633,000 under the said agreement by reason of the failure of the defendant to hand over the title deeds/ agreements.
>
> However, upon a more careful reading the pleading is capable of disclosing another separate cause of action for money had and received, ...

From the above, it is clear that the learned judge was right that the claim was under the settlement deed. The learned judge more or less conceded that there was no evidence to support that claim. The learned judge found that the claim under the settlement by the respondent could not succeed but then went on to consider that there was evidence for money had and received. Learned counsel for the appellant submitted that the statement of claim disclosed only a claim to enforce a settlement and no other. For that the learned judge should have dismissed the respondent's claim as found in the statement of claim. I am of the view that the learned counsel was right.

Whether The Court Has The Right To Impose Or Substitute The Claim By The Plaintiff

The learned judge after concluding that there was no evidence to support the respondent's claim to enforce the settlement deed then went on to consider that there was a claim by the respondent for money had and received. The learned judge then came to the conclusion that the respondent succeeded in its claim for money had and received. The learned counsel for the appellant submitted that the learned judge had erred when he substituted the claim to enforce a settlement for a claim for money had and received. The court has no right to look for a claim in the statement of claim and substitute if for the claim made by the respondent in the statement of claim.

It is trite law that the parties are bound by their own pleadings. In the case of *State Government of Perak v. Muniandy* [1986] 1 MLJ 490 where at p. 492 Hashim Yeop A. Sani SCJ (as he then was) said:

> Purporting to rely on Twine and Conway the appellant in their statement of defence averred that the respondent was on the said JKR lorry at the time of the accident "without the express or implied authority of the appellant" and that the respondent boarded the lorry to deliver money to his wife which was a personal matter and not connected with his employment. It would appear from the record of the proceedings before the trial Judge that the appellant attempted to introduce evidence relating to a certain administrative circular dated December 29, 1969 which

prohibited all employees from boarding government vehicles without permission. DW2, a JKR supervisor, however, admitted in his evidence that he himself never saw this administrative circular at any time before the hearing. The learned Judge noted that the statement of defence never pleaded that:

(1) There was such a prohibition affecting employees of the appellant; and

(2) The driver had allowed the respondent to travel in the lorry in breach of the prohibition.

Parties are bound by their pleadings and we do not think that the appellant should on the admitted facts of this case be allowed to avoid vicarious liability merely on the bare fact that there was such an administrative circular relating to the prohibition.

In *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J in his judgment at pp. 196 and 197 said:

It was not open to the learned magistrate to fly off at a target as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v. Pollard & Morris*: "Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

This case was followed in our own Court of Appeal in *Haji Mohamed Dom v. Sakiman* where Sir Charles Mathew CJ said:

I think It is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record.

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. ...

Both the authorities were cited with approval by the former Supreme Court. In *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 CLJ 667; ([1991] 1 CLJ (Rep) 239) where at pp. 671 and 673 (at pp. 244-246) Jermuri Serjan SCJ (as he then was) delivering the judgment of the court said:

> It does not seem necessary for us to emphasise and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how such lapses in the courts should be tolerated at the expense of the clients.
>
> Perhaps it would be sufficient and pertinent to repeat here in the hope that we have said the last words on this issue, what Raja Azlan Shah FJ (as he then was) said in *Chartered Bank v. Yong Chan* at p. 159:
>
> > In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.
>
> and what Sharma J said in *Janagi v. Ong Boon Kiat* at p. 197:
>
> > A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.
>
> The observation of Lord Edmund-Davies in the case of *Farrel v. Secretary of State* at p. 173 are equally pertinent:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it.

Lastly, on the same topic we would adopt the observations of Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corp.* at p. 241 where he said:

> It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.

We need only to refer to three recent cases where this court had to deal with similar issues to illustrate occurrences of lapses on the part of solicitors in the preparation of their pleadings with the resultant dire consequences. We refer to the recent appeal in this court which had occasion to decide the issue whether to allow a new point raised on appeal but not pleaded and argued in the High Court. In that case the court was unanimous in its decision to refuse to allow the new point to be argued without calling for fresh evidence. Mohamed Azmi SCJ in delivering the judgment of the court in the case of *Muniandy & Anor v. Muhamad Abdul Kader & Ors.* said at page 418:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 (refd) at p. 233:
>
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the

> right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...

Again on the same page the learned judge continued:

> In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality. The so-called 'omission' is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and to the said ground tenancy, they claimed, *albeit* mistakenly, protection against eviction under the rent control legislation.

In yet another very recent case the same issue fell to be determined by this court. Hashim Yeop A. Sani CJ (Malaya) in delivering the judgment of this court quoted *Muniandy*'s case and Mohamed Azmi SCJ's observations quoted above. At p. 363 of the judgment the learned CJ said:

> The crucial issue of the application of the doctrine of severance should have been pleaded and argued before the learned judge and it would be wrong in our view to allow the alternative ground of appeal to be argued at this late stage.

See the case of *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor*. One of the grounds of the dismissal of the appeal by the bank was that the doctrines of severance was not pleaded and argued in the court of first instance. The most recent case where the same subject was discussed is *Associated Pan Malaysia Cement Sdn. Bhd. v. Syarikat Teknikal & Kejuruteraan Sdn. Bhd.* Gunn Chit Tuan SCJ at p. 296 has this to say:

> As regards the tax element it is impossible to assess the reduction to be made for taxation without any or sufficient evidence. Had there been a deduction for tax the amount awarded would of course be less, and following *Daishowa*'s case the amount of damages awarded would have been reduced further. However, as pointed out by Mr. Murthi, the question of deduction of income tax was not raised at all before the trial judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability. In the circumstances of this case we would therefore decline to make any further deductions for tax.

All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

In *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157, Raja Azlan Shah FJ (HRH then) at p. 159 said:

> I have set out the pleadings in some detail in order to show that no complaint was made that the bank had wrongfully and in breach of its duty dishonoured the said cheque. The learned judge took the view that it was immaterial whether the respondent's claim was to recover damages for breach of contract or for libel because he was of the opinion that the two actions can and sometimes are combined in one, and he therefore concluded that the statement of claim was framed in such a way that it included damages for wrongfully refusing to honour the said cheque and for libel contained in the written answer.
>
> With respect I cannot help thinking that the learned judge took rather a wrong view of what is truly the function of pleadings. While it is legitimate to say that a wrongful dishonour of a cheque, in itself, gives rise to two possible causes of action, one for a proper case the practice has been to combine the two claims in one action, rules of pleadings determine how those claims may be so combined. Now the function of pleadings is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them. See *Esso Petroleum Co. Ltd. v. Southport Corporation.*
>
> In the court below the case made against the bank rested entirely on the allegation of libel. If the respondent's pleadings had been put in the alternative, either that there was breach of duty or that the answer on the dishonoured cheque was libellous, the case would no doubt had been developed on wholly different grounds. It is idle at the present stage to speculate what evidence might have been adduced by either side on the other allegation, and what would have happened if such a case had been made. Lord Radcliffe puts the matter succinctly in the above case (page 244):
>
> > In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars, and it is equally clear from what he says at the close of his judgment that he did not regard himself as having expressly or impliedly authorised any such amendment.

> That being so, I am of opinion that the appellants called as much evidence as was required of them to defend themselves from the charges of negligence that were made in this case.
>
> In that case the trial turned upon the issue of negligence ie, navigational error, and not upon the issue of unseaworthiness.
>
> In my opinion the learned judge was clearly wrong when he concluded that the pleadings included a claim for breach of contract as well as a claim for libel.

In *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; ([1990] 1 CLJ (Rep) 330) the plaintiff brought an action against the defendant for breach of contract. The defendant in that case agreed to purchase 100,000 shares for a total consideration of $350,000. On the execution of the contract the defendant paid the plaintiff the sum of $35,000 as deposit. The defendant failed to complete the purchase. As a result the plaintiff had to sell the shares to a third party for the sum of $210,912.30. The plaintiff claimed from the defendant the sum of $139,088 as agreed liquidated damages for the breach, ie, the difference between the agreed and forced sale price of the shares. The learned trial judge accepted the contention of the defendant that the plaintiff was not in possession of the 100,000 shares on the day of completion. He, however, noted and accepted the evidence of the plaintiff that the defendant had offered to pay $70,000 in settlement of the matter. The trial judge held that if the parties to a contract had agreed that the original contract be rescind, altered or be substituted by a new contract, the original contract need not be performed. He then went on to hold that the plaintiff was not entitled to sue on the original contract and since the plaintiff did not make any claim in the alternative under the subsequent agreement, the learned judge was unable to award the plaintiff the sum of $70,000 under the settlement. The learned judge then dismissed the claim. On appeal, the Supreme Court held that as the trial judge had made a decision on an issue which was not raised by the pleadings, the appeal should be allowed. Gunn Chit Tuan SCJ (as he then was) at p. 1115 (at p. 333) said:

> Mr. Subramaniam, counsel for the appellant, pointed out that the learned judge had decided on an issue which was not reflected in the pleadings or the submissions of the parties. He stressed that the substitution of a new contract under s. 63 of the Contracts Act 1950 was never an issue between the parties and referred to the written submission of defence in the court below in which Mr. D'Cruz, counsel for the defendant, had asked the court to rely on the written agreement in this case. Counsel also

pointed out that the defendant had pleaded that there was no waiver of the original agreement and had not pleaded any oral agreement, which he urged the court to ignore, as neither side had pleaded a new contract. The learned judge had therefore erred in holding that there was a new substituted contract, and reference was made to *Janagi v. Ong Boon Kiat* in which Sharma J (as he then was) had made observations on the function of pleadings and the duty of courts to follow rules of procedure and practice. We agreed with the following passage in the judgment of the learned judge in that case in which his Lordship stated:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.
>
> ...

We would point out that this court has recently once again stressed the importance of pleadings in *Muniandy & Anor v. Muhammad Abdul Kader & Ors* in which Mohamed Azmi SCJ stated at p. 418 that:

> Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Production v. Hamilton* [1983] 1 AC 191 at p. 233:
>
> > Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...
> >
> > As the High Court had made a decision on an issue which was not raised by the parties in their pleadings, the appeal in this case must be allowed and the order of the learned judge in dismissing the plaintiff's claim set aside.

From the record it is clear to me that the respondent argued in the court below the question of unjust enrichment. Before us, the learned counsel for the respondent repeated the same argument. Though the learned judge did not make any specific finding in respect of this, it is clear to me

that that argument swayed the learned judge when he said that the money was never utilised for the purpose it was intended to. In other words, the learned judge was saying that the appellant had pocketed the money himself. I have gone through the statement of claim and it was clear to me that the issue of unjust enrichment was never pleaded by the respondent. For that it is necessary for us to take heed what had been stated by Lee Hun Hoe CJ (Borneo) (as he then was) in *Brown & Root (Labuan) Sdn. Bhd. v. Pada Sdn Bhd* [1987] 1 CLJ 229; ([1987] CLJ (Rep) 78, lest we go astray. At p. 232 (at p. 80) his Lordship stated:

> Although the question of unjust enrichment was argued in the court below and here, a careful perusal of the pleadings did not show that this was properly pleaded. No objection was taken by the respondents on this as the respondents' counsel referred to unjust enrichment in his affidavit. If we had been fully aware at the outset of all the circumstances we would not have allowed the appellants to raise the issue after abandoning the ground of constructive trust. It was after the hearing and preparing our judgment that we looked carefully at the pleadings that we realised how scanty, through no fault of the appellants, were the materials on which such an issue could he raised. Nevertheless, we do not think the learned judge had come to the wrong conclusion when he stated that unjust enrichment was irrelevant in the light of the facts of the case.

From the decision of the learned judge it could be seen that the learned judge was swayed in giving decision in favour of the respondent on the ground that the appellant had in fact committed fraud or dishonesty in not utilising the money for the purpose it was intended. In his judgment the learned judge said:

> Although the minutes of 18.10.1987 did not bind the defendant, it tends to support plaintiff's claim that the monies were never used for the purpose for which it was intended.

For this purpose it is clear from the authorities that fraud or dishonesty must be specifically pleaded. I have only to cite the observation made by Mohamed Dzaiddin FCJ (the learned CJ as he then was) in *United Merchant Finance Bhd. v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 where at p. 161 his Lordship said:

> On counsel's submission that the defence did not consist bare allegation of fraud but the defendants had sufficiently explained it in the defence, it is a settled rule of practice that where fraud or dishonesty is material, this must be clearly pleaded, if not explicitly, then in such terms that the reader of the pleading can be left in no reasonable doubt what is being alleged. Further, where an element in the alleged fraud or dishonesty relied

on is the other party's knowledge of a given fact or state of affairs, this must be explicitly pleaded (*Lipkin Corman v. Karpnale Ltd.* [1989] FLR 137; [1992] 4 All ER 409 CA). In the instant case, we can only look at defence since the supporting affidavit was rejected by the trial judge. On this basis, it is clear to us that paras. 5 and 6 of the defence do not condescent to particulars of the alleged fraud. Merely pleading that even if the two fixed deposit receipts were issued and renewed (which the defendants denied) and that they had been done so without due authority and/or in fraud of the defendants is not enough. The defendants must state with sufficient particularity the circumstances how the two fixed deposit receipts were allegedly issued in fraud of the defendants. For the above reason and in the light of the principles of pleading which must be duly observed, we cannot agree with counsel's contention that the defence contains a sufficient plea of fraud.

The authorities cited above made it clear that the parties must confine their case within the perimeter of their pleadings. I agree with the contention of the learned counsel for the appellant that the claim by the respondent was for the payment of RM633,000 under the settlement as stated in para. 11 of the statement of claim. The respondent had ample opportunity to amend the statement of claim but the respondent chose not to do it. The learned trial judge found as a matter of fact that there was no agreement in respect of a settlement between the parties. The claim by the respondent should have been dismissed. I agree with the submission of the learned counsel for the appellant that the learned judge had erred when he substituted the claim for money had and received for a claim to enforce a settlement. From the authorities I have cited earlier the learned judge could not do the substitution.

For the reasons I have stated above I would allow the appeal.

Finding Of The Learned Judge On Money Had And Received

The learned trial judge gave his decision in favour of the respondent on the ground that there was sufficient evidence to show that the appellant had taken and received money from the respondent. From the evidence it is clear to me that this was not a simple transaction of money had and received, such as a loan transaction or the appellant had borrowed the money from the respondent or the appellant had committed a breach of trust.

At all material times the appellant was the managing director of the respondent. As stated in the statement of claim the total sum of RM633,000 was entrusted to him in order to secure joint venture agreements with various landowners in three projects, which in my mind

were business deals. The joint venture agreements were in respect of three areas to develop them into oil palm plantations to be managed by the respondent. The appellant was given the green light by the board of directors to negotiate and secure the joint venture agreements and was also entrusted with that sum of money to achieve that goal. From the evidence it is clear that the respondent was in the business of oil palm plantation. The task that was given to the appellant was to help the respondent in the expansion of its business, ie, the plantation. There was evidence to show the appellant had succeeded in securing a joint venture agreement with various landowners in one area. Based on that success the appellant was entrusted with this task. Two things have to be borne in mind that this was a business deal to be done on behalf of the respondent and that the business was only in respect of securing joint venture agreements. In a business deal either it could be successful or it could end up with a failure. As to the joint venture agreements, there is no question of acquiring the title deeds of the various landowners. It is only to obtain their consent to their land being grouped together to form a plantation to be managed by the respondent. No reason was given why the respondent chose this course of action instead of purchasing the land outright from the landowners. After perusing the evidence two reasons crossed my mind. One, the respondent had no sufficient fund to purchase the land outright and secondly, there might he some restrictions on transfer in the land deeds. Whatever it was, it was clear to me that the board of directors had entrusted that sum of money to the appellant to carry out some business deals on behalf of the respondent. It is in this light I have to consider the sums of money given to the appellant by the respondent.

The appellant in the present appeal did not deny that he had received the total sum of money from the respondent but that money was entrusted for a purpose, ie, to secure joint venture agreements with various landowners. It is common ground that the appellant was given the money to secure joint venture agreements in the following areas:

(a) RM369,000 to secure a joint venture agreement with the landowners in the area known as Senggang B;

(b) RM185,000 to secure a joint venture agreement with the various landowners in the area known as Senggang E; and

(c) RM109,000 to secure a joint venture agreement with the various landowners in the area known as Tanah Hong.

Let me now deal with each separate area because it appears to me that each had different considerations and degree of success according to the evidence as found in the record. It should be remembered that the money was entrusted to the appellant in order to enable him to strike business deals on behalf of the respondent as directed by the board of directors. It was not money given to the appellant for safekeeping or for a loan given to him whereby the respondent has the right for repayment if the money was not returned. To me the real issue is whether the appellant had expended the money to secure the deals as directed by the respondent.

(a) It was not disputed that the respondent had entrusted the sum of RM369,000 to the appellant in order to secure a joint venture agreement with the landowners in an area which was identified as project "Senggang B". From the record the land in that area comprised of smallholdings. Altogether there were 132 owners to the smallholdings. To secure the joint venture agreement in order to develop the smallholdings into an oil palm estate or plantation the appellant had to deal with the 132 landowners. To me this is a mammoth task. Even to strike an agreement between two parties difficulties have been encountered, what more with 132 landowners. The appellant had to obtain not only the consent of all the 132 landowners but also the agreement of all the terms and conditions in the joint venture agreement. To me it could be easier for the respondent to purchase the smallholdings outright and convert them into an estate. For reasons best known to the respondent, the respondent did not choose to do it that way.

Appellant gave evidence that in order to secure the joint venture agreement successfully he had to enlist the services of some influential local people who would know all the 132 landowners in order to negotiate with all the landowners. For that the appellant enlisted the help of Khor Weng Cheong, Abdul Razak bin Alang Mohd. and Osman bin Taib. Appellant also stated that Abdul Razak bin Alang Mohd. had been appointed the attorney for all the 132 landowners. It is clear from the evidence that the respondent did not give any guideline or timeframe for the appellant to secure the joint venture agreement. All that the respondent was interested was the joint venture agreement. In other words the attitude of the respondent was that "I give you the sum of RM369,000 and you attempt to secure on my behalf the joint venture. How you do it is not my

concern". In order to enlist the help of the influential locals as I have stated above it is not difficult to infer that the appellant had to expend some money on them. Appellant in his statement of defence stated that he had expended the whole sum of RM369,000 as expenditure for the negotiation and payments to the landowners as premiums in agreeing to the joint venture agreement. Appellant went on to state that he did secure the joint venture agreement with the landowners in Senggang B whereby all the landowners had executed the joint venture agreement. The joint venture agreement as stated by the appellant was handed to the company's secretary. The land deeds were held by the attorney for the landowners, Abdul Razak bin Alang Mohd. As far as the appellant is concerned he had succeeded in securing the joint venture agreement with the landowners and the sum of RM369,000 was fully expended for the purpose entrusted to him. As such he was not liable to refund the said sum to the respondent.

The respondent did not show any evidence to show that all the money or any part of the money was not utilised to secure the joint venture agreement. The issue raised by the respondent in the statement of claim was not whether the money was given to the plaintiff but whether the money given to the plaintiff was expended for the purpose entrusted to him in accordance with the trust deed, that is to secure a joint venture agreement. It is clear from the evidence of the appellant, which was not contradicted, that the money entrusted to him had been expended to secure the joint venture agreement. As contended by the learned counsel for the appellant that there was no denial by the respondent that the joint venture agreement was deposited with the respondent's secretary. The respondent was informed about this.

The respondent took up the issue in respect of the title deeds. The appellant had explained that the title deeds were with the landowners' appointed attorney. Was the title deeds part of the deal? In my view it is not. The deal was to secure the joint venture agreement. Further, the landowners' appointed attorney was prudent enough to hold onto the title deeds until the whole project is a success, that is Senggang B is developed by the respondent to be an oil palm estate. Otherwise the attorney would be held responsible by the landowners. Apparently, from the minutes of the meetings of the board of directors of the respondent, the respondent had run out of funds. The respondent had no money even to pay the staff their salaries what more to develop the Senggang B as an estate.

From the evidence it is clear to me that the appellant had expended the sum of RM369,000 for the purpose entrusted to him under the trust deed. As such the respondent is not entitled to claim for refund of that sum. I would dismiss the respondent's claim in respect of this.

(b) The sum of RM185,000 was entrusted to the appellant by the respondent to secure a joint venture agreement with landowners in an area known as Rancangan Tanah Senggang E. The appellant in his defence stated that the money was disbursed to the various landowners. Appellant admitted that he failed to secure the joint venture agreement. The appellant did not adduce any evidence to show that he had attempted to secure the said agreement with the landowners. There was no evidence of any negotiation between the parties. The only evidence adduced was that he was assured by the attorney to the landowners that the landowners would sign the joint venture agreement. It is clear to me that the appellant, unlike in the case of Senggang B, did not participate or take active part in negotiating for a joint venture agreement. What the appellant did was to hand over the said sum of RM185,000 to the attorney and left it to the attorney to negotiate for the joint venture agreement. There was no evidence to show that the attorney had the agreement of all the landowners in Senggang E to enter into a joint venture agreement with the respondent. On the other hand, from the excerpts of the minutes of the meeting of the board, the attorney admitted receiving the said sum of RM185,000, but nowhere it is stated that the attorney had expended the said sum to secure the agreement. For that reason, I am of the view that the appellant failed to satisfy the court that the said sum was expended for the purpose it was entrusted to him. It might well be that the money was pocketed by the attorney but the fact remains that the said sum was not expended to secure the joint venture agreement.

(c) The third sum of RM109,000 was entrusted to secure a joint venture agreement with the landowners in Scheme Tanah Hong. Evidence which was not contradicted shows that the area in respect of Tanah Hong was some 1,000 acres of smallholdings. It would not be wrong for me to say that this was the biggest project involving many landowners. Evidence was also led to show that other parties were interested and that the land office was also interested in this project by the fact that the land deeds were held by the land office. According to the minutes of the respondent's board meeting, the other directors were told of this. Appellant gave evidence that he informed the board that the sum of RM109,000 was not enough to pay the

premiums to the landowners. In order to secure the deal the appellant requested an additional sum of RM391,000 to satisfy all the landowners and to obtain the land deeds from the land office. Appellant went on to say that the RM109,000 had been paid to some landowners as deposits. From the evidence, it is clear to me that the respondent was not able to meet this additional sum due to its lack of fund. As it is, I am of the view that the respondent was partly to be blamed when the appellant was unable to secure the joint venture agreement in respect of Tanah Hong. The appellant had done his best. It is clear he had expended the said sum for the purpose entrusted to him. For that reason, I am of the view that it would be unfair and unjust if the appellant is to be asked to refund the said sum when the deal fell through due to the respondent's inability to pay the balance.

As I have stated earlier, the total sum of RM663,000 was given or entrusted to the appellant to secure certain business deals on behalf of the respondent. This was not a case where the money was given to him as a loan or it was taken from the respondent without its consent where a simple evidence of money had and received is required. Here, the money was given to him for some purposes and we have to view whether the money was utilised for those purposes. It is clear to me that the sums of RM369,000 and RM109,000 were fully expended to secure those purposes but for some reasons the deals did not materialise. It would not be just to ask the appellant to refund those sums because the business did not materialise. As to the sum of RM185,000, it is clear that this was not used by the appellant for the purpose it was given because there was no evidence that the sum was used for the purpose it was intended to. The appellant should refund the said sum to the respondent.

From the submission of the learned counsel for the respondent in respect of the money handed to the appellant, it is apparent to me the respondent is alleging that the money was handed to the appellant for certain purposes. When those purposes failed to materialise and the money was not refunded the appellant had committed dishonesty or fraud. The answer to this is found in the Federal Court's decision of *United Merchant Finance Bhd. v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151 where it was held that where fraud or dishonesty is material, it must be clearly pleaded, if not explicitly, then in such terms that there is no reasonable doubt as to what is being alleged. In the present appeal, it is clear to me that fraud or dishonesty was never pleaded but evidence was allowed to be led that the appellant was given certain sums of money to

secure certain joint ventures. It was alleged by the respondent that the appellant failed to secure the deals but also failed to return the money to the respondent. By doing so the appellant had committed a dishonest act.

In my view, the appellant could not be said to act dishonestly since it was not pleaded.

Cross-appeal In Respect Of The Counterclaim

In his statement of defence, the appellant counter-claimed against the respondent for the sum of RM100,640.09 which was advanced to the respondent on various occasions. Apparently, the respondent admitted this but contended that part of the amount had been paid. The respondent cited certain vouchers to substantiate this. The original vouchers were never produced. In his judgment the learned judge stated:

> Plaintiff does not deny that RM100,604.09 had been adanced by defendant to plaintif, but alleged that RM70,000 had been paid to defendant *vide* the following vouchers:
>
> i) No. 0495 for RM50,000 dated 7.9.86
>
> ii) No. 0496 for RM20,000 dated 7.9.86 leaving balance due to defendant RM34,655.93 as at December 1986 *vide* Statement of Account (not produced).
>
> (See PW2's evidence)
>
> Defendant denied signing these 2 vouchers and receiving the sums from the plaintiff.
>
> Plaintiff failed to produce the two original vouchers allegedly signed by defendant and the Statement of Account.
>
> Counterclaim allowed with costs and interest.

In my view the learned judge had assessed and evaluated the evidence in respect of the counterclaim and came to the right conclusion. I would therefore dismiss the respondent's counter-appeal in respect of the counterclaim.

Conclusion

For the reasons stated above I would allow the appeal in part by the appellant and dismiss the cross-appeal by the respondent.

Even assuming the appellant is liable he would be liable only in the sum of RM185,000. As such the respondent is entitled to recover the sum of RM185,000, that is the refund of the money given in respect of the Senggang E.

Costs to the appellant.